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Supreme Court, U. S.
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MICHAEL ROBAK, JR., CLERK

78-1318

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1318.

HELEN B. O'BANNON, Secretary of Public Welfare,
Petitioner,

v.

TOWN COURT NURSING CENTER, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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RESPONDENTS' BRIEF IN OPPOSITION.

Respondents Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt oppose the petition of Helen O'Bannon, Secretary of Public Welfare for the Commonwealth of Pennsylvania, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 29, 1978.

I. OPINIONS BELOW.

The majority and dissenting opinions of the Court of Appeals are reported at 586 F. 2d 280 and are set out in the appendix to the Petition for Writ of Certiorari at 24a, 60a. The District Court's order is set out therein at 23a. An oral opinion issued in connection therewith is set out in the appendix hereto at A5. A prior order and opinion of the District Court is set out in the appendix hereto at A1.

II. JURISDICTION.

Petition seeks to invoke the jurisdiction of this Court pursuant to 28 U. S. C. § 1254. There is no jurisdiction here because petitioner filed no appeal or cross-appeal from the Order of the District Court which Order was affirmed in relevant part by the United States Court of Appeals for the Third Circuit. See V. C. *infra* for further discussion.

III. QUESTIONS PRESENTED.

The petition presents two questions. The first, as referred in II. above, is a result of the failure of Petitioner's predecessor as Secretary of Public Welfare to appeal or cross-appeal from the Order of the District Court granting respondents' relief. The Court of Appeals received a brief

and heard argument from Petitioner's predecessor only as an appellee. The Court of Appeals affirmed the Order of this District Court in relevant part. Thus, the following question is presented:

> Whether this Court has jurisdiction pursuant to 28 U. S. C. § 1254 with respect to review sought by a party who, as an appellee only prevailed in the court below.

The second question presented is whether or not patients in a skilled nursing facility who, according to the opinion of the District Court and the uncontradicted testimony heard therein, would suffer substantial adverse physical and psychological effects in any transfer to another facility (hereinafter referred to as "transfer trauma"), have a constitutionally protected property interest both in the certification of that facility under Title XVIII and XIX of the Social Security Act, 42 U. S. C. A. § 1395 *et seq.* and § 1396 *et seq.*, respectively, and remaining in that facility until they are provided some form of hearing.

IV. STATEMENT OF THE CASE.

In May, 1977, Town Court Nursing Center, Inc. ("Town Court"), a one hundred ninety-eight bed skilled nursing facility,[1] received notice from the Secretary of Health, Education and Welfare that as of June 18, 1977, with an additional thirty (30) day period for patient transfer, it was decertified as a Medicare provider. Subsequently, based entirely upon this federal action, Petitioner, through a predecessor, notified Town Court that its participation in the Pennsylvania Medicaid program would

1. Under Pennsylvania law, skilled nursing facilites provide 24-hour nursing care and related services under the general direction of a licensed physician. 28 Pa. Code § 213.1 *et seq.* Lesser degrees of medical services are provided by intermediate care facilities and domicilliary care facilities, respectively.

terminate on the same date. Town Court filed administrative appeals both on state and Federal levels which appeals are presently pending.

On July 20, 1977 Respondents filed a Complaint in the Eastern District of Pennsylvania seeking to enjoin Respondent from removing them from Town Court and contending that Town Court's decertification unconstitutionally violated their right to the procedural safeguards of the Fifth and Fourteenth Amendments. The District Court granted a temporary restraining order and, after a hearing, a preliminary injunction accompanied by an oral opinion (A1). Respondents later applied for an extension of the preliminary injunction and a further hearing was held. Again the District Court issued an oral opinion and an order (A5), thereafter entered in written form, granting in part and denying in part Respondents' requested relief.[2]

Respondents appealed from the denial of relief, and obtained an injunction pending appeal from the lower court with respect to that relief. The Secretary of Health, Education and Welfare cross-appealed. Petitioner neither appealed nor cross-appealed from the Order of the District Court. The Court of Appeals vacated the judgment and remanded the cause to the District Court for further proceedings consistent with the relief sought by Respondents. The Court of Appeals also affirmed that portion of the Order which was subject to the cross-appeal.

Petitioner, through her immediate predecessor, then sought enlargement of time within which to file petition for certiorari, stating, *inter alia*, "[t]he decision of the Solicitor General with respect to whether or not to petition for certiorari has a direct bearing on whether the Secretary will petition for certiorari." [Second] Application for En-

2. In the District Court, Petitioner filed a motion to dismiss which motion was opposed by Respondents. No decision has been rendered on that motion.

largement of Time Within Which To File Petition for Writ of Certiorari, at 2. Although identical relief was granted by the Court of Appeals against the Secretary of Health, Education and Welfare, no petition for certiorari has been filed by the Solicitor General on behalf of the Secretary.

V. REASONS FOR DENYING THE WRIT.

A. There Is No Division Among the Circuits.

This is no "real and embarrassing conflict of opinion and authority" between the courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393, 67 L. ed. 712, 714, 43 S. Ct. 422 (1923).

Petitioner first contends that the decision of the Third Circuit in this case is in direct conflict with the decision of the Ninth Circuit in *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978).

Moore involved a claim by recipients of Veterans Administration benefits under 38 U. S. C. §§ 620-628 that their transfer to another facility violated their constitutional rights. The benefits involved were domicilliary care and vocational training provided to veterans in need of, but unable to afford domicilliary care, incapable of earning a living and having no adequate means of support. 38 U. S. C. § 610(b)(2). According to Veterans Administration regulations, domicilliary care is "the furnishing of a home to a veteran, embracing the furnishing of shelter, food, clothing, and other comfort of home, including such incidental medical care as is necessary to maintain him." 38 CFR § 17.30(n). Thus, recipients of Veterans Administration domicilliary care need not be in need of medical care at all and, indeed, in *Moore* there was no allegation that plaintiffs were in need of, or were receiving, medical care of any kind.

In sum, none of the issues which arose in *Moore* also appear in this case either by way of conflicting precedent or conflicting principles of law.

Petitioner also cites *Caton Ridge Nursing Home, Inc. v. Califano*, 447 F. Supp. 1222 (D. Md. 1978), *aff'd* No. 78-1290 (4th Cir., filed Feb. 26, 1979) (per curiam). In

its unpublished opinion (attached as Exhibit "A" hereto), the United States Court of Appeals for the Fourth Circuit stated:

> [W]e note that Klein v. Califano, 586 F. 2d 250 (3d Cir. 1978), which was decided after the district court's decision, does not suggest a different result. In *Klein*, the Third Circuit held that nursing home residents were entitled to a hearing prior to decertification of the facility as a qualified Medicaid provider and transfer of its patients. The Third Circuit, however, specifically distinguished its holding from that of the district court in *Caton Ridge*. *See* 586 F. 2d at 260 n. 17. The alleged violations of the nursing home in *Klein* involved deficient services rendered to the patients. Thus, the residents could be expected to contribute relevant information in the context of a pre-transfer hearing. In contrast, Caton Ridge was decertified because of its failure to correct structural and other defects which constituted a fire hazard. As the district court noted in its opinion, there is no reason to believe that patient input could shed any light on Caton Ridge's non-compliance with the life safety code. 447 Supp. at 1226.

The rules of the Court of Appeals for the Fourth Circuit provide that an opinion will be published in the event, *inter alia*, it "creates a conflict with a decision in another circuit; . . ." 4th Cir. R. 18. Thus, that court, in determining not to publish its opinion in *Caton Ridge*, concluded that no conflict existed with *Klein* and *Town Court*. Further, the decision itself impliedly agrees with the decisions in both *Klein* and *Town Court*.

Finally, petitioner cites a third decision, *Cook v. Bates*, No. 78 Civ. 3600 (S. D. N. Y., Oct. 6, 1978) (Carter, D.J.), reported in CCH Medicare and Medicaid Guide ¶ 29,410. *Cook* involved termination of state funding for psychiatric counseling at a methadone maintenance center. The court distinguished its holding from that of *Bracco v. Lackner*, No. C-78-0471 (N. D. Cal., April 5, 1978), in which the transfer of patients from a decertified skilled nursing facility was enjoined until a pretermination hearing was held because of the transfer trauma suffered by patients upon transfer. See also *Cook v. Bates*, No. 78 Civ. 3600 (S. D. N. Y., Aug. 22, 1978) (Sweet, D.J.) (decision on earlier motion for preliminary injunction distinguishing *Bracco* on same grounds).

Therefore, no division among the Circuits exists on the question raised by Petitioner.

B. The Decision of the Lower Court Was Correct.

The lower court held that the patients of a skilled nursing facility had a constitutionally cognizable property interest in the status of the facility as a certified provider under the Medicare and Medicaid programs.

The lower court cited as controlling the holding of *Klein v. Califano*, 586 F. 2d 250 (3d Cir. 1978), which was decided the same day as *Town Court*. In *Klein*, the lower court held that "[t]he statutory provision permitting a recipient to obtain medical care from a freely selected provider and the regulations prescribing limited conditions for transferring a resident of a nursing home create a legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer." *Id.* at 258. The court did not address an alternative argument, also presented in *Town Court*, that the transfer trauma suffered by dislocated nursing home residents reduces the financial benefits provided to them by the Medicare and Medicaid programs. *Id.* at 259-60 n. 16.

Thus, there are two independent bases for finding the property interests upon which the holding of the lower court rests.

Petitioner's response is that the programs are limited to qualified providers and that the decision to decertify a particular provider does not affect a recipient's eligibility for services.

This argument puts the cart before the horse. Where, as in this case, the uncontradicted evidence is that these patients would suffer mental and physical harm if they were transferred to another facility, the question is whether or not the facility is qualified to render the care necessary to sustain their physical and mental well-being considering the harm such a transfer would cause them. *Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 56 L. Ed. 2d 30, 42 n. 15 98 S. Ct. 1554, 1563 n. 15 (1978) (where uninterrupted continuity of service is essential to health and safety, consumers should be given an opportunity to present their reasons for opposing termination prior to cessation of service).

Further, Respondents' claim under 45 C. F. R. § 205.10 must also be recognized. That claim was not directly discussed by the lower court. The cited regulation provides that timely notice and an opportunity for a pretermination hearing must be given to any recipient "who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance." See *Mathews v. Eldridge*, 424 U. S. 319, 326 n. 5, 47 L. Ed. 2d 18, 28 n. 5, 96 S. Ct. 893, 898 n. 5 (1976). Other regulations provide that a patient may be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay." 45 C. F. R. § 249.12(a)(1)(ii)(B)(4) (1976).

No opportunity for a pretermination hearing was provided here. Had such a hearing been held, a determination of the sufficiency of the reasons for transfer would have occurred. By failing to provide such a hearing, Petitioner violated both the constitutional and administrative rights of patients at Town Court.

C. The Petitioner Cannot Invoke the Jurisdiction of This Court in the Absence of Any Appeal or Cross-Appeal by Petitioner From the Order of the District Court.

In the compainion case, *Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 266 (3d Cir. 1978), the lower court discussed the failure of Petitioner to appeal or cross-appeal from an identical order entered with respect to Town Court itself:

> In this court, however, Secretary Beal [one of Petitioner's predecessors] expressly had declined to take a position on the legal issues raised on appeal. Nor has he cross-appealed from that portion of the district court's judgment that enjoined him from discontinuing payments to Town Court for care rendered Medicaid patients.
>
> * * *
>
> Secretary Beal has chosen not to cross-appeal, unlike Secretary Califano. He apparently so acted in the belief that, since he was required to terminate Town Court's Medicaid agreement upon Secretary Califano's termination of Town Court's Medicare provider status, he is under no independent obligation to provide funding should Secretary Califano not also be obligated to provide reimbursement.
>
> We believe Secretary Beal misconceives his position in this litigation. Town Court sued him independently. It alleged a cause of action against him that was not derivative of the cause of action against

> Secretary Califano, but was based on alleged independent violations of Town Court's constitutional rights to due process. In these circumstances, the judgment of the district court must be seen as binding Secretary Beal to continue Medicaid payments regardless of Secretary Califano's obligation to continue reimbursement.
>
> Since Secretary Beal has not cross-appealed, the propriety of the order that the district court entered against him is not before us. This appeal, however, is from a preliminary proceeding in the district court. Upon remand, therefore, Secretary Beal will be free to seek a modification of the district court's order to conform to the judgment of this court with respect to Town Court's rights.

Id. at 278-79.

In so holding, the lower court followed the law regarding the necessity of filing an appeal or cross-appeal. That law is equally applicable to bar review presently sought by Petitioner from the lower court's order. *E.g., Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191-92, 81 L. Ed. 593, 598, 57 S. Ct. 325 (1937); *Penfield Co. v. SEC*, 330 U. S. 585, 594, 91 L. Ed. 1117, 1125, 67 S. Ct. 916 (1947).

D. Proposed Federal Law Will Prohibit a State Medicaid Program From Adopting Termination Procedures Inconsistent With Federal Law When a Skilled Nursing Facility Participates in Both Medicare and Medicaid Programs.

Proposed Federal regulations will, if adopted, require a state to follow Federal procedures in decertifying a skilled nursing facility when that facility is certified under both Medicaid and Medicare programs. 44 F. R. 9749 (Feb. 15, 1979) (regulation to become effective May 16, 1979). Thus, where Federal procedure requires a pretermination hearing under Medicare, as required in *Town Court*, the state will be required to provide a pretermination hearing under Medicaid. If the regulation becomes effective, any decision in this case favorable to the State would not affect decertification efforts affecting patients in other facilities certified for both Medicare and Medicaid.

E. This Proceeding Is at an Interlocutory State and, Hence, Review Would Be Premature.

This case has been remanded for further proceedings. There are pending preliminary objections which must be decided and a determination of the process due Respondents must also be made. Therefore, review at this interlocutory stage of the litigation would be inappropriate. *Hamilton-Brown Shoe Co. v. United States*, 240 U. S. 251, 258, 60 L. Ed. 629, 633-34, 36 S. Ct. 269 (1916).

Petitioner cites *Skehan v. Board of Trustees*, Nos. 77-2311/12, slip op. at 22 (3d Cir., filed Dec. 21, 1978), to establish the finality of such rulings. Petition for Writ of Certiorari at 14 n. 20. However, in *Skehan*, certain defendants had succeeded in obtaining dismissal of the litigation. Review was obtained from these final judgments. This case, in contrast, is interlocutory in nature as to all defendants.

CONCLUSION.

For the foregoing reasons, Respondents respectfully request that the petition for writ of ceritorari be denied.

Respectfully submitted,

WILLIAM F. COYLE,
Attorney for Respondents.

EXHIBIT "A".

[Unpublished]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1290

Caton Ridge Nursing Home, Inc.
and Ethel Grabill,

Appellants,

v.

Joseph A. Califano, Jr., Sec. of Health, Education & Welfare and Maryland State Department of Health and Mental Hygiene and Neil Soloman, Secretary, Maryland State Department of Health and Mental Hygiene,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Joseph H. Young, District Judge.

Argued February 5, 1979 Decided February 26, 1979

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

Robert J. Thieblot for appellants; Diane C. Moskal, Assistant Regional Attorney, Office of the General Counsel, Department of HEW; Randall Lutz, Assistant Attorney General (Francis Bill Burch, Attorney General; Louise T. Keelty, Assistant Attorney General on brief) for appellees.

PER CURIAM:

Plaintiffs Caton Ridge Nursing Home, Inc., and Ethel Grabill, a former patient at the home, brought this action against state and federal officials challenging the procedures used to terminate Caton Ridge from participation as a provider in the Medicaid program, and to effect the transfer of Grabill and other Medicaid patients to other nursing care facilities. The district court found that neither the nursing home nor the patient was denied due process of law. We affirm the entry of summary judgment in favor of the defendants for reasons adequately stated by the district court. Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222 (D. Md. 1978).

Additionally, we note that Klein v. Cailfano, 586 F. 2d 250 (3d Cir. 1978), which was decided after the district court's decision, does not suggest a different result. In *Klein*, the Third Circuit held that nursing home residents were entitled to a hearing prior to decertification of the facility as a qualified Medicaid provider and transfer of its patients. The Third Circuit, however, specifically distinguished its holding from that of the district court in *Caton Ridge*. *See* 586 F. 2d at 260 n. 17. The alleged violations of the nursing home in *Klein* involved deficient services rendered to the patients. Thus, the residents could be expected to contribute relevant information in the context of a pre-transfer hearing. In contrast, Caton Ridge was decertified because of its failure to correct

structural and other defects which constituted a fire hazard. As the district court noted in its opinion, there is no reason to believe that patient input could shed any light on Caton Ridge's non-compliance with the life safety code. 447 F. Supp. at 1226.

Accordingly, the judgment of the district court is affirmed.

APPENDIX.

[99]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 77-2474

TOWN COURT NURSING CENTER, INC., et al.

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania

and

JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

Philadelphia, Pennsylvania
July 27, 1977

Before HON. JOHN P. FULLAM, *J.*

PRELIMINARY HEARING

APPEARANCES:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL
by NATHAN L. POSNER, ESQ.,
JEFFREY B. ALBERT, ESQ.,
for Plaintiff Town Court Nursing Center, Inc.

[100]

SAUL LEVIT, ESQ.,
for Additional Plaintiffs

FAITH M. ANGELL, ESQ.,
Deputy Attorney General,
for Secretary of Public Welfare—
Commonwealth of Pennsylvania

MARGARET HATHAWAY, ESQ.,
Assistant Attorney General,
for Secretary of the United States—
Department of Health, Education and Welfare,
Defendant

JENNIFER A. STILLER, ESQ.,
Assistant Attorney General,
for Department of Health—
Commonwealth of Pennsylvania

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(Commenced at 10:10 o'clock a.m.)

The Court: Anything further in the Town Court matter?

Mr. Levit: Good morning. I am Saul Levit. I am here for William Coyle. He teaches some mornings.

The Court: I hope he teaches students as well as some mornings.

Anything from the defense?

Ms. Angell: Excuse me, Your Honor, I think counsel would like an opportunity to see you in chambers.

The Court: All right.

(Conference in chambers at 10:11 o'clock a.m.)

(Discussion off the record.)

(The following on the record at 10:50 o'clock a.m.)

The Court: I will note for the record that all of the exhibits which were referred to by the witnesses and identified yesterday have been received in evidence and will be deemed part of the record.

(Plaintiffs' Exhibits 1 through 11 and Defendants' Exhibits 1 through 6 received in evidence.)

The Court: I will note further that I have at counsel's request met with them in chambers and they in turn have met with each other, and it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition.

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Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.

Since it is clear on the record that the continuation of patients in that nursing home during that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—

under all these circumstances the following Order is entered:

That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pending application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.

It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary

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choice or in cases of medical necessity. In short, there will be attempt to simply transfer patients for the sake of putting them in some other place rather than this.

And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

I believe that covers it, does it not?

Mr. Posner: It is satisfactory to me, sir.

The Court: O.K. Good luck with the administrative review. I hope it proceeds expeditiously.

Thank you all.

(Concluded at 10:56 o'clock a.m.)

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2473

TOWN COURT NURSING CENTER, INC., et al.

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania

and

JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

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Philadelphia, Pennsylvania
September 15, 1977

Before HON. JOHN P. FULLAM, *J.*

APPEARANCES:

FOX, ROTHSCHILD, O'BRIEN AND FRANKEL
by NATHAN L. POSNER, ESQ.,
JEFFREY B. ALBERT, ESQ.,
for Plaintiff Town Court Nursing Center, Inc.

[107]

ABRAHAMS & LOWENSTEIN
by WILLIAM F. COYLE, ESQ.,
for Additional Plaintiffs

MARGARET HATHAWAY, ESQ.,
Assistant Attorney General
for Secretary of the United States, Department of Health, Education and Welfare, Defendant

ROBERT S. FORSTER, JR., ESQ.,
Assistant United States Attorney,
for the Government

MARIA PARISH VICKERS, ESQ.,
Assistant Attorney General,
for the Commonwealth of Pennsylvania

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FULLAM, *J.*:

I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.

Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very

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good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there

than they would be anywhere else in the foreseeable future.

I am also satisfied that the evidence which has been presented this morning by the first witness sounded more like a memorized recitation than testimony about facts. It was full of sweeping conclusions and gobeldygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in review of documentation and appearance here in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a

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position which I frankly do not understand and never will, there is nothing that the Court can do about it.

If the administrative bureaucrats persist in being blind to facts, if they persist in looking at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

The Motion for Continuance of the Preliminary Injunction is denied except as follows:

The defendants are restrained from disapproving Medicare and Medicaid payments to those patients who are in the Home now and otherwise entitled thereto, so long as they remain patients in the home.

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The effect of this will be that the plaintiff, Town Court Nursing Home, is not to be required to maintain patients without their being entitled to Medicare payments for those patients who are there.

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a bureaucratic judgment based upon what is on paper and what may have existed in the past.

This hearing is concluded.

(Concluded at 11:22 a.m.).